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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/619,971	07/15/2003	Nadeen B. Myers	41482-41410	7833

21888 7590 03/02/2007
THOMPSON COBURN, LLP
ONE US BANK PLAZA
SUITE 3500
ST LOUIS, MO 63101

EXAMINER	
PRATT, HELEN F	
ART UNIT	**PAPER NUMBER**
1761	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/02/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)	
	10/619,971	MYERS, NADEEN B.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *05 February 2007*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-17,19-34 and 36-39* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☒ Claim(s) *19-34 and 36-39* is/are allowed.

6)☒ Claim(s) *1-17* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1-5, 11, 12, 13, 16, 17 are rejected under 35 U.S.C. 102(a) as being anticipated by Hutt et al. (6,730,337).

Hutt et al. disclose a calcium supplemented fluid composition as in claims 1 -4 containing tricalcium phosphate dissolved in an acidulent solution which is considered to be acid since the beverage has a pH of from 3.0-4.5, preferably 3.7 to 3.9 (col. 3, lines 19-31, lines 44-54, col. 4, lines 4-15). The transparent liquid can be apple juice or cranberry juice (col. 2, lines 51-60. Calcium is added in amounts of 42% of the RDA. The whole beverage is considered to be the TCP solution since it contains and it contains 47% of the RDA for calcium and is free of visible sediment since it is clear (col. 3, lines 20-30).

The beverage is considered to be shelf stable since it is pasteurized as in claim 5 (col. 4, lines 5-15).

Flavoring and coloring is disclosed as in claims 11 and 12 in col. 4, lines 58-61, and juices as in claim 13, in col. 2, lines 51-60.

The use of citric, phosphoric, fumaric and malic is acid is disclosed in col. 3, lines 44-50 as in claim 16.

The composition has been shown as in claim 17 as above. The limitation as to dissolving the TPC in acid is seen as a method limitation in a composition claim.

The composition has been shown as in claim 1 as above. Claim 1 also contains process limitations. The fact that the procedures of the reference are different than that of applicant is not a sufficient reason for allowing the product-by-process claims since the patentability of such claims is based upon the product formed and not the method by which it was produced. See In re Thorpe 227 USPQ 964. The burden is upon applicant to submit objective evidence to support their position as to the product-by-process claims. See Ex parte Jungfer 18 USPQ 2D 1796.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 6-10, 14, 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hutt et al.

Claims 6-8 further require various storage temperatures for the beverage and as in claim 9 that the beverage is stored at a temperature in which the beverage is flowable. However, it would have been within the skill of the ordinary worker to store beverages at suitable temperatures, which would have enhanced the characteristics of the beverage. Therefore, it would have been obvious to store the composition under conditions, which would enhance the characteristics of the composition.

Nothing new is seen in the use of carbonation for beverages as in claim 10, which is very well known as in carbonated juices and colas. Therefore, it would have been obvious to carbonate a beverage if desired.

Nothing is seen as in claims 14 and 15 that the particle size of the TCP of Hutt et al. is not within the claimed particle size range as the beverage is a clear beverage and larger particle sizes would have increased the amount of sediment in the beverage. Therefore, it would have been obvious to use the claimed particle size, which allows for a clear beverage.

ALLOWABLE SUBJECT MATTER

Claims 19-34, 37-39 allowed.

ARGUMENTS

Applicant's arguments filed 2-5-07 have been fully considered but they are not persuasive. Applicant argues that calcium triphosphate is listed as only one of a dozen potential calcium sources by Hutt et al. and that calcium lactate is preferred. However, calcium triphosphate has been listed and nothing has been shown that it would not have produced a clear beverage. Applicant argues that a clear solution at a pH of 4.5 is to be obtained according to the reference (col. 3, lines 20-25) and that there is no clear guidance as to how to obtain a clear solution given the number of calcium sources. Applicant also argues that Hutt et al. states that ranges from 3.5 to 4.2 are preferred and that the disclosure amounts to an invitation to experiment. However, this is not seen as the reference specifically discloses enough acid to make a pH of 3 to 4.5. In addition, the claims are COMPOSITION claims and the method of making is not

given weight. See In re Thorpe as cited previously. The reference discloses a calcium containing fluid composition containing TCP at a pH of 3, which is clear in the claimed amounts. These are the composition limitations, which have been given weight.

Applicant argues that the teachings of Hutt et al. were duplicated in an affidavit by the inventor. However, applicant is using preferred ranges and not what the reference teaches.

As to Atofina, points within the range have been cited (pH of 3) (col. 3, lines 44-45).

Applicant's showing is not persuasive since it is only to a preferred pH. If applicant could have shown that no product containing TCP could be made that was not clear at any pH from 3 to 4.5, this would have been persuasive.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-872-9300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 2-28-07

H. Pratt

HELEN PRATT
PRIMARY EXAMINER